United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1437

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P57

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

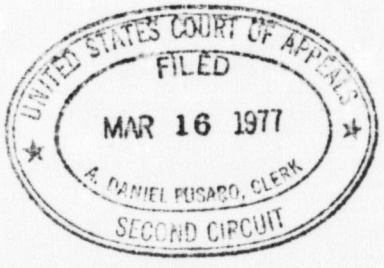
APPEAL

GERALD J. BROWN and
ANTHONY L. CAVALLARO,

Docket No. 76-1437

Defendants - Appellants.

BRIEF FOR APPELLANT, GERALD J. BROWN



Respectfully submitted,

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BRIEF FOR APPELLANT,
GERALD J. BROWN

GERALD J. BROWN and
ANTHONY L. CAVALLARO,

Defendants - Appellants.

STATEMENT OF THE ISSUES PRESENTED

POINT I. Whether the prosecution failed to make a prima facie case beyond a reasonable doubt of a violation of 18 U.S.C. 1201(a) and 2.

POINT II. Whether the trial Court committed reversible error in admitting into evidence, irrelevant and highly prejudicial testimony concerning subsequent criminal activity of appellants which was in no way connected or related to the crime charged.

POINT III. Whether the extent and nature of the trial Judge's questions and his comments in the presence of the jury manifested a bias in favor of the prosecution depriving appellants of their constitutional right to a fair trial.

STATEMENT OF THE CASE

This is an appeal from a judgment entered on September 16, 1976, in the United States District Court for the Northern District of New York (MacMahon, J.) following a trial by jury convicting Gerald J. Brown of a violation of 18 U.S.C. 1201 (a) and 2. Appellant was sentenced on September 16, 1976, to a 25 year term of imprisonment and is presently incarcerated at the Federal Penitentiary at Lewisburg, Pennsylvania.

STATEMENT OF FACTS

The testimony at trial disclosed that in the morning of December 10, 1975, Mary Shepardson visited the apartment of Debbie Buchanan at 5 Camden Street in the Endwell area so that Debbie Buchanan could babysit for her child while Mary Shepardson attempted to acquire fuel for her trailer. (34)* At the apartment was Richard Fitch, Debbie's boyfriend. Dick Sampson lived in the upstairs apartment. Mary Shepardson testified that she left her child with Debbie Buchanan, proceeded to the welfare office in Binghamton and, while hitch-hiking, was picked up by Tony Cavallaro (36, 129). She had known Tony Cavallaro for about a year (37). Tony Cavallaro's wife used to babysit for her child (131). After the welfare office refused her money, she returned to Debbie Buchanan's apartment. While Mary Shepardson could not remember if Tony Cavallaro was at Debbie Buchanan's apartment when she returned from the welfare office in Binghamton (135), Debbie Buchanan and Richard Fitch testified that Tony Cavallaro was in the apartment when Mary Shepardson returned (211, 220) and that, in her presence, there was a general discussion about Dick Sampson and Jerry Brooks (198). Mary Shepardson then went with Richard Fitch to look for fuel, and thereafter went out to buy some groceries. She returned to Debbie Buchanan's apartment that afternoon because Debbie Buchanan told her that her former boyfriend, Dave Baer, was coming down with Tony Cavallaro to talk to her (39, 137). She testified that she would have left

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*REFERENCES ARE TO THE TRIAL TRANSCRIPT.

Debbie Buchanan's apartment but stayed because she was going to see Tony Cavallaro (145). Mary Shepardson testified that she first learned of Jerry Brooks' involvement in the drug rip-off from Debbie Buchanan after she returned from the grocery store (151, 163). However, both Debbie Buchanan and Richard Fitch testified that she was in the apartment before she went to the grocery store when Tony Cavallaro, Debbie Buchanan, Richard Fitch and Mary Shepardson were having a general discussion concerning Dick Sampson and Jerry Brooks (198).

A tall and big man entered the apartment (Mary Shepardson later learned his name was Gerald Brown because police showed her a number of pictures (46)) and told her to come outside and that Dave Baer was out there and wanted to talk to her. The man informed her that "we are going for a ride" (41). Gerald Brown did not physically harm or threaten Mary Shepardson at the apartment (147). Mary Shepardson went into the car which was parked under a street light and across the street from a well-lighted McDonald's parking lot (139, 192, 210) In the car were Dave Baer and Tony Cavallaro. Tony Cavallaro was driving and Dave Baer was in the back seat. Mary Shepardson testified that "I just thought they wanted me to talk to Dave, Dave wanted to talk to me" (45).

Somewhere in Pennsylvania (50), Tony Cavallaro told Mary Shepardson that he was tired of being ripped-off and lied to. Gerald Brown told her that she better tell the truth about what happened (48). Mary Shepardson explained that Tony Cavallaro had been ripped-off for pot and wanted his money back (49). Tony Cavallaro displayed a gun and pointed it at her. Thereafter, the car stopped and Dave Baer and Mary Shepardson were taken to the

front of the car. Gerald Brown then fired three shots (51). Gerald Brown then told Tony Cavallaro that Mary Shepardson must be O.K. and that she didn't know anything about the rip-off. They all got back into the car and drove to a bar in Montrose, Pennsylvania where they had drinks for an hour and a half (53, 211). Tony Cavallaro then drove Dave Baer home (55). Mary Shepardson went upstairs to use the bathroom and then was driven back to Debbie Buchanan's apartment where she had a beer and passed out on the couch (57).

Mary Shepardson testified that she never told anyone that she did not want to go for a ride, nor did she ask them to stop the car. She never attempted to escape nor did she call the police (57, 58). Mary Shepardson was awakened early in the morning by police who inquired about the events of the prior night.

After two unsuccessful attempts to make an in-court identification of Gerald Brown, once erroneously identifying an attorney wearing a yellow shirt, Mary Shepardson was able to identify Gerald Brown only after the trial Judge asked Gerald Brown to rise (40, 61, 62).

On cross-examination, Mary Shepardson admitted having drug experiences, including cocaine and marijuana (118). She had known Jerry Brooks for two to three weeks (116). She met him while she was living with Dick Sampson; before that, she had lived with Dave Baer (120). While she admits that on December 5, 1975, Jerry Brooks came over to Dave Baer's apartment when Mary Shepardson was there, and that Mary Shepardson went with Jerry Brooks to see another individual, she denies that there was any

discussion about drugs (127). She also admitted that Jerry Brooks was in her trailer with her (164). For the first time at trial, Mary Shepardson said that her hands were held behind her by Gerald Brown during the car ride (55, 161). However, she also testified that, until they stopped in Pennsylvania, she was sitting in the front with Tony Cavallaro,and Gerald Brown and Dave Baer were in the rear seat (59).

Mary Shepardson's testimony was very clouded as to times and dates since she explained that she doesn't keep track of time or dates (121, 124). The testimony of Debbie Buchanan and Richard Fitch, however, placed the events in a more comprehensible chronological sequence. Debbie Buchanan testified that on the afternoon of December 10, 1975, Tony Cavallaro, Gerald Brown and Dave Baer came to her apartment (200) and said that they were looking for Dick Sampson who was involved in a drug rip-off (203). Tony Cavallaro and Gerald Brown asked Richard Fitch to break and enter Dick Sampson's apartment (205). Mary Shepardson was present in the apartment during the period that Gerald Brown and Tony Cavallaro were there (206, 211). Tony Cavallaro and Gerald Brown left between 2 and 3 in the afternoon (205).

Mary Shepardson left the apartment and returned about 6 o'clock (206). Dave Baer called and said that Tony Cavallaro and he were coming over to get Mary Shepardson (207). That night, Gerald Brown came over to the apartment and told Mary Shepardson to get her coat because somebody wanted to talk to her in the car (209). Rather than call the police, Debbie Buchanan called Dick Sampson (210, 220). Mary Shepardson testified

that the first time she learned of the drug deal was from Debbie Buchanan after Mary Shepardson returned from the grocery store. Mary Shepardson, however, told Debbie Buchanan that a week before she had talked to Jerry Brooks about the drug deal (216). Debbie Buchanan testified concerning a note that was found in Dick Sampson's apartment signed by Jerry Brooks. The contents of the note were: "My luggage is here, I have a rip-off deal to do in Binghamton with some freak. Don't worry, you'll get your money out of it. Mary let us in the apartment. The money is in the owl." (218) Further, between 2 p.m. and 6 p.m. on the afternoon of December 10, 1975, Mary Shepardson told Debbie Buchanan that she called Jerry Brooks and warned him not to come down because there were people waiting for him (219).

Mary Shepardson knew that Tony Cavallaro was going to return that evening (220), yet nobody called the police (221). Debbie Buchanan let Gerald Brown in the apartment after he knocked because she was expecting him (227).

Dave Baer, the only other person beside Mary Shepardson who was in the car during the alleged kidnapping who testified at trial, was called as a prosecution witness and stated that Tony Cavallaro and Gerald Brown wanted to learn the whereabouts of Jerry Brooks and David LaMont (260) and wanted to speak to Mary Shepardson (261). On the evening of December 10, 1975, Tony Cavallaro called Dave Baer on the phone and told him that he wanted to talk to Mary Shepardson because they had previously spoken to her and Mary Shepardson was getting some information as to the whereabouts of Jerry Brooks. Tony Cavallaro said that Mary Shepardson was expecting them, and he wanted Dave Baer to

be there since Mary Shepardson was his girlfriend. Dave Baer called up Mary Shepardson and told her he was coming down. Mary Shepardson was expecting a visit by Tony Cavallaro and Gerald Brown (263). Gerald Brown and Tony Cavallaro picked Dave Baer up in the car and drove to Debbie Buchanan's house to pick up Mary Shepardson (263). Gerald Brown went into the apartment and escorted Mary Shepardson out. Gerald Brown went into the back seat, Mary Shepardson got into the front, and Tony Cavallaro was driving. Gerald Brown wanted to know if Mary Shepardson had anything to do with the rip-off (263). Mary Shepardson said that she had nothing to do with it (365). Tony Cavallaro stopped the car and Dave Baer told Tony Cavallaro to put some pressure on him and to lay off Mary Shepardson. Dave Baer suggested that Gerald Brown shoot some random shots in the air. In accordance with the suggestion, Gerald Brown told Dave Baer and Mary Shepardson to stand up against the side wall and, as "just a role that he was putting on", fired some random shots (267). Tony Cavallaro said that was enough and they got back into the car.

Dave Baer testified that he told Mary Shepardson he was coming to get her (274). He did not observe any use of force (275). Nobody pushed Mary Shepardson into the car and her hands were not held behind her (276). Dave Baer further explained that during the afternoon of December 10, 1975, he was at Debbie Buchanan's apartment when Tony Cavallaro and Gerald Brown were there (278). When Mary Shepardson returned from the welfare office, Dave Baer talked to her and Mary Shepardson told him that she would get Jerry Brooks' address because she wanted to cooperate since they were all friends (278, 280).

Dick Sampson, who lived in the upstairs apartment at 5 Camden Street (233), testified that after midnight he was visited by Tony Cavallaro and Gerald Brown. After defense counsel's request for an offer of proof was denied (235), Dick Sampson testified that Gerald Brown held a gun on him while Tony Cavallaro came in and said that we would have a talk about the drug rip-off (236, 237). The three went to Tony Cavallaro's house where Gerald Brown shot him (238). Dick Sampson was then taken to the hospital. Inasmuch as Dick Sampson testified that he did not see Mary Shepardson after he was shot, and since the Assistant United States Attorney states that he could not connect the testimony, the trial Judge ordered the testimony stricken (239).

The defense counsel then called Dick Sampson as his own witness. Dick Sampson testified that he lived with Mary Shepardson upstairs for several years (240). When he went to Cleveland between December 5 and 7, 1975, Mary Shepardson moved out of his apartment and into a trailer (241). Dick Sampson told Mary Shepardson that he knew she was involved in a drug rip-off and told her not to get involved (241, 243). She said that she didn't care as long as she got her money (243). The Assistant United States Attorney asked no further questions. The Court asked if Dick Sampson saw Mary Shepardson after the shooting. Dick Sampson explained that he did, in the hospital four or five days after the incident (245) for about two minutes. The trial Judge then re-admitted the previously stricken testimony on the basis that it tends to establish the plan and intent on the part of the defendants (247). Mary Shepardson asked Dick

Sampson why he got involved because she had everything under control (257).

The prosecution's final witness, F.B.I. Special Agent Richard Worst, testified that on December 18, 1975, he interviewed Mary Shepardson Debbie Buchanan, Richard Fitch and Dave Baer (282).

The defense called one witness, Ronald Steele, who testified that on December 10, 1975, he tended bar on South Mount Road in Redinger. He observed four individuals come in after midnight and identified them as Gerald Brown, Tony Cavallaro, Mary Shepardson and Dave Baer (307). They ordered drinks at the bar and took them to the table. After an hour and a half, they left. He observed nothing unusual about the lady (309).

ARGUMENT

POINT I

THE PROSECUTION FAILED TO MAKE A PRIMA FACIE CASE BEYOND A REASONABLE DOUBT OF A VIOLATION OF 18 U.S.C. 1201(a) AND 2.

It is clear from the testimony of the prosecution's own witnesses that Mary Shepardson personally knew Tony Cavallaro and Dave Baer and was aware that the appellants were coming to pick her up. She knew the reason why they sought information from her, cooperated in obtaining that information, and believed that she "had everything under control." She waited for them to come to Debbie Buchanan's apartment and willingly entered the car. There was no "unlawful seizure" and there was no kidnapping. We are presented with a case of overzealous prosecution. While the appellants herein do not appear to be free from committing

certain criminal activity, what is clear is that the evidence presented is insufficient as a matter of law to find the appellants guilty of a violation of 18 U.S.C. 1201(a) and 2.

The indictment charged the appellants with knowingly transporting in interstate commerce Mary Shepardson "who had theretofore been unlawfully seized, inveigled, deccyed, carried away and held by the said Anthony L. Cavallaro and Gerald J. Brown for ransom, reward or otherwise, that is, for the purpose of obtaining information."

There is no question that the appellants engaged in criminal activity by shooting weapons in order to obtain information; however, they did not unlawfully seize, inveigle, decoy or carry away Mary Shepardson. Mary Shepardson cooperated in obtaining information sought, waited for their arrival, and willingly went with them with the full knowledge that the appellants sought information. There was no coercion, force or menacing in New York. Only when the car stopped in Pennsylvania, and when guns were drawn,was there any illegal confinement. Thus, the criminal activity was totally intrastate, commenced and terminated in Pennsylvania. The element of coercion or deception, central to the crime of kidnapping, was absent in New York Chatwin v. United States, 326 U.S. 455 (1946); cf. United States v. Healy, 376 U.S. 72, 82 (1964). There was no asportation but only subsequent independent intrastate criminal activity in Pennsylvania. Such activity is insufficient to sustain this conviction under the Federal Kidnapping Statute.

The United States Supreme Court has cautioned against an overly broad reading of this statute. "Were we to sanction a

careless concept of the crime of kidnapping or were we to disregard the background and setting of the act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction." Chatwin v. United States 326 U.S. 455, 464-465 (1946). The heart of the crime of kidnapping is a seizure and detention against the will of the victim. United States v. Wolford, 444 F.2d 876, 883 (CA D.C. 1971). It is well settled that, in prosecutions pursuant to the Federal Kidnapping Statute, "involuntariness of seizure and detention....is the very essence of the crime...., [and] the true elements of the offense are an unlawful seizure and holding, followed by interstate transportation." Chatwin v. United States,326 U.S. 445, 464 (1946); Gawne v. United States, 409 F.2d 1399, 1403 (9th Cir. 1969),cert. denied, 397 U.S. 943, rehearing denied, 397 U.S. 1059 (1970). See, also, United States v. Atchinson, 524 F.2d 367, 370 (7th Cir. 1975); United States v. Young, 512 F.2d 321, 323 (4th Cir. 1975). Since the elements of the offense of kidnapping are an unlawful seizure and holding followed by interstate transportation, United States v. Atchinson, 524 F.2d 367, 370 (7th Cir. 1975); Gawne v. United States, 409 F.2d 1399, 1403 (9th Cir. 1969) and the evidence in the record fails to disclose any unlawful seizure and holding in New York prior to the alleged

confinement in Pennsylvania, the elements of the offense have not been established and the judgment of conviction should be reversed and indictment dismissed.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE, IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY CONCERNING SUBSEQUENT CRIMINAL ACTIVITY OF APPELLANTS WHICH WAS IN NO WAY CONNECTED OR RELATED TO THE CRIME CHARGED.

This was a close case since the verdict depended almost entirely on the jury's finding that Mary Shepardson did not consent to the ride. The trial Judge permitted irrelevant and highly prejudicial evidence when it admitted into evidence the testimony of Dick Sampson. Since neither Tony Cavallaro nor Gerald Brown testified at the trial, their character was not in issue. Evidence of subsequent criminal activity,whose only relevance was to either show a propensity to commit crime or the violent character of the appellants, was improper, highly prejudicial and, under the circumstances of this case, must have had a substantial effect upon the jury.

Dick Sampson's testimony that, subsequent to the appellants returning Mary Shepardson to Debbie Buchanan's apartment, they visited him and thereafter shot him, was totally unrelated to the crime that the appellants herein were charged. The trial Judge, noting that, after Dick Sampson was allegedly shot by the appellants he did not see Mary Shepardson, ruled that the testimony be stricken (238). However, after the defense counsel called Dick Sampson as his own witness and questioned him concerning his prior relationship with Mary Shepardson and

his knowledge about her connection with Jerry Brooks and the drug rip-off, the Court asked Dick Sampson if he saw Mary Shepardson after the shooting. Dick Sampson replied that he had, in the hospital, briefly for about two minutes. The Court asked Dick Sampson, "Did you say 'I am sorry you got hurt?'" Dick Sampson answered that he did not, but he knew that she got hurt. (245) At this point, the trial Judge restored the testimony that had previously been stricken. Thereafter, the defense counsel elicited from Dick Sampson that the conversation in the hospital transpired five days after the incident and that Mary Shepardson didn't know anything about the shooting (246). The trial Judge, realizing that the shooting occurred after the alleged kidnapping, stated to the Assistant United States Attorney, "It is not relevant. You should not have put it in, and unless you can connect it and show that this would make her afraid." (246) The trial Judge then allowed all of Dick Sampson's testimony to stand, finding the testimony "exceedingly relevant" as to the defendants' course of conduct.

In his charge, the trial Judge stated that the jury "may not consider that evidence, evidence of a subsequent similar act to be one charged here on the question of whether the defendant kidnapped Mary Shepardson. But you may consider it on the question of whether the defendant acted intentionally, whether he had a guilty consciousness. You may also consider that evidence on the question of whether the defendant had a common plan or design and also on the question of the identity of the defendant Brown." (376, 377)

It is submitted that the testimony of Dick Sampson

concerning the alleged shooting by the appellants subsequent to the alleged kidnapping was irrelevant to the issues in the instant trial and so prejudicial as to require a new trial (Fed. R. Evid. 403, 404(b)).

The alleged shooting of Dick Sampson occurred after the kidnapping (cf. United States v. Frazier, 418 F.2d 854 (4th Cir. 1969), United States v. Weems, 398 F.2d 274 (4th Cir. 1968). As such, this independent subsequent act has no relevance to show intent of the appellant to kidnap. Further, as seen from POINT I (infra) the basic elements of kidnapping are an unlawful seizure and holding followed by interstate transportation. The prosecution has failed in any way to show and, in fact, it is impossible to demonstrate that Mary Shepardson's state of mind as to whether she was afraid at the time of the alleged kidnapping could be affected in any manner by subsequent actions by the appellants or Dick Sampson. The prosecution has failed in any way to connect these subsequent actions to the case at trial.

The appellants cannot form an intent to kidnap after the kidnapping had already taken place. The alleged criminal actions are dissimilar in nature. The fact that the appellants may have shot Dick Sampson has no relevance to a previously terminated criminal transaction. The only effect that the admitted evidence could have would be to place the appellants' character in issue. However, since neither appellant took the stand, their character was not in issue. The subsequent shooting of Dick Sampson was an event unrelated and irrelevant to the prior alleged kidnapping. Evidence of such activity was highly prejudicial and should never have been allowed into evidence.

In view of the impact that the shooting of Dick Sampson would have on the minds of the jurors, the admission of Dick Sampson's testimony cannot be considered merely harmless error. To add this testimony to the evidence in order to prove that the victim was held against her will would clearly tip the scales in favor of the prosecution and turn a close question of fact into a certain conviction. The peripheral relevance of the shooting as to the identity of Gerald Brown was far outweighed by the prejudicial impact of the evidence and, at least, it was an abuse of judicial discretion to permit the same into evidence for any limited purpose.

POINT III

THE EXTENT AND NATURE OF THE TRIAL JUDGE'S QUESTIONS AND HIS COMMENTS IN THE PRESENCE OF THE JURY MANIFESTED A BIAS IN FAVOR OF THE PROSECUTION DEPRIVING APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The record is replete with instances where the trial Judge interrupted counsel to examine witnesses (35, 36, 44, 45, 46, 47, 49, 54, 55, 56, 58, 59, 60, 119, 132, 133, 134, 142, 150, 151, 152, 156, 157, 158, 159, 160, 163, 172, 173, 176, 177, 185, 187, 192, 193, 194, 197, 199, 202, 206, 208, 209, 211, 212, 217, 234, 235, 238, 241, 244, 245, 250, 256, 264, 265, 266, 267, 268, 270, 275, 277, 279, 280, 281, 282, 283, 284, 286, 287, 288, 289, 290, 291, 292, 295), made instructions to counsel in the presence of the jury (112, 120, 127, 144, 154, 172, 175, 230, 232, 285, 295), made sarcastic remarks in the presence of the jury (191, 220, 224, 233, 236, 251, 260), and sustained objections that were never made (39, 114, 115, 122, 172, 177). It is,

therefore, submitted that the trial Judge overstepped the limits of permissible trial control and thereby deprived appellants of a fair trial.

While trial Judges have an affirmative obligation to assist the jury in understanding the evidence by asking questions to clarify testimony, said intervention should not be the rule and the trial Judge should never manifest bias. United States v. D'Anna, 450 F.2d 1201 (2nd Cir. 1971); United States v. Grunberger, 431 F.2d 1062 (2nd Cir. 1970); United States v. Guglielmini, 384 F.2d 602 (2nd Cir. 1967).

It is unfair to take specific instances out of context from the trial record to show bias; however, it is submitted that a thorough reading of the trial record will demonstrate that the trial Judge's timing and nature of questions asked, whether willful or not, manifested a bias in favor of the prosecution. Whenever the prosecutor was having difficulty eliciting the testimony he desired, the trial Judge would assume the task; however, the same was not true on behalf of defense counsel. This, in fact, is illustrated at the end of the cross-examination of Dave Baer after the defense had established that Mary Shepardson was very cooperative with the appellants and had known Tony Cavallaro for a year, the trial Judge from left field asked who fired the shots into the air and where did he get the gun (280). The questions asked by the Court destroyed any effect of defense counsel's effective cross-examination relating to Mary Shepardson's consent and focused the jury's attention on previously established events. The Judge became directly involved in prosecuting the case. From such actions by the trial Judge, the jury could easily

infer that the trial Judge desired a conviction. This Judge and members of the jury had previously worked long hours together (3, 20, 21, 359) and, thus, any indication of judicial bias must have had a substantial impact on the jury. The trial Judge also gave the impression that the Assistant United States Attorney was either asleep or incompetent. Twice, he told the prosecutor to "wake up" (120, 175) and stated,in the presence of the jury, after sustaining an objection that was never made, "If this were an adversary proceeding you (defense counsel) would never get away with it" (178). The Court further stated, "I guess he (United States Attorney) doesn't know how to ask a question without leading." (203).

It appears that the trial Judge was wearing two hats, one as an impartial arbiter and the other as a prosecutor. The manner in which the trial Judge prodded Mary Shepardson in making an in-Court identification of Gerald Brown was totally impermissible (62). Following the trial, the trial Judge indicated that the crime "is the most vicious, serious crime to come before me in 17 years on the Federal bench in the City of New York, dealing with all kinds of criminals" (396, 397). It should be recognized that nobody was injured during the alleged kidnapping, there was no prolonged detention,and the victim herself believed that she had everything under control. However, such feelings held by the Judge were clearly manifest to the jury during trial and, consequently, deprived appellants of a fair trial.

THE BRIEF SUBMITTED BY CO-COUNSEL ON BEHALF OF APPELLANT, ANTHONY CAVALLARO, IS HEREBY INCORPORATED BY REFERENCE AND THE ARGUMENTS ADOPTED AS IF SET FORTH HEREIN AT LENGTH.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed, or, in the alternative, the judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,

Stuart E. Finer

STUART E. FINER, Esq.
Attorney for Appellant, Gerald J. Brown

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

AFFIDAVIT OF SERVICE
BY MAIL

GERALD J. BROWN and
ANTHONY L. CAVALLARO,

Defendants - Appellants.

STATE OF NEW YORK)
COUNTY OF ONEIDA) ss.:

MARY ANN MILLER, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 42 Sherrill Lane, New Hartford, New York. That on the 28th day of January, 1977, deponent served the within Brief for Appellant, Gerald J. Brown, upon Joseph A. Pavone, Assistant United States Attorney, attorney for Appellee, United States of America, at Federal Building, Syracuse, New York 13201, the address designated by said attorney for that purpose by depositing same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Maryann Miller
Mary Ann Miller

Sworn to before me,

this 28th day of January, 1977.

Stuart E Finer
Notary Public

STUART E. FINER
Notary Public, State of New York
No. 6293340
Qualified in Oneida County
Commission expires March 30, 1978